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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|-----------------|-------------|----------------------|---------------------|------------------|
| 10/529,568      | 03/28/2005  | Frank J Viola        | 2862 (203-3506)     | 9151             |

7590 05/18/2007  
Paul R Audet Senior Patent & Trademark Counsel  
U S Surgical a division of  
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| EXAMINER |
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RADA, RINALDI I

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| ART UNIT | PAPER NUMBER |
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3721

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| MAIL DATE | DELIVERY MODE |
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05/18/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

|   |                 |                |  |
|---|-----------------|----------------|--|
| <b>Advisory Action</b><br><b>Before the Filing of an Appeal Brief</b> | Application No. | Applicant(s)   |  |
|   | 10/529,568      | VIOLA, FRANK J |  |
|   | Examiner        | Art Unit       |  |
|   | Rinaldi I. Rada | 3721           |  |

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 04 May 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires 3 months from the mailing date of the final rejection.  
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

#### AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

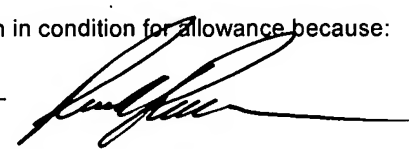
4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☒ Applicant's reply has overcome the following rejection(s): 35 USC 112, 2<sup>nd</sup>.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: none.  
Claim(s) objected to: \_\_\_\_\_.  
Claim(s) rejected: 17-27 and 37.  
Claim(s) withdrawn from consideration: 28-36 and 38-40.

#### AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

#### REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_  
13. ☐ Other: \_\_\_\_\_

  
**Rinaldi I. Rada**  
**Supervisory Patent Examiner**  
**Group 3700**

Continuation of 11. does NOT place the application in condition for allowance because: Applicants contend that Plyley does not disclose moving the distal end of the first jaw away from second jaw during a second portion of the actuation stroke. This is not found persuasive as claims are given their broadest reasonable interpretation consistent with the specification. In this instance, claim 17 does not specify the actuation stroke nor does it specify when each of the 3 stroke portions occur. It is the examiner's position that Plyley's stapler, at one point of the operation, will have its 1st jaw move away from the 2nd jaw, e.g. after the staples have been fired and the when the stapler is being withdrawn. Furthermore, the claim does not describe any specific structure to perform such function. Claim 17 merely recites "the approximation member is movable to move....." It is the examiner's position that Plyley, indeed, shows an approximation member that is capable of performing the recited function that applicant is referring to.

Continuation of Substance of Interview including description of the general nature of what was agreed to if an agreement was reached, or any other comments: Applicant's representatives contended that Plyley does not show the distal end of the 1st jaw moving away from the second jaw during a 2nd portion of the actuation stroke. Examiner agreed that Plyley does not have the same movements as applicant's stapler but asserted that the claims do not specifically defined such movement. Examiner further asserted in the later interview date that claim 17 is not limited to a stapler with the 3 stage movement - that claim 17 does not define a stapler or a specific mechanism that perform the 3 stage movement of the 1st jaw relative to the 2nd jaw - that claim 17 does not specify the actuating stroke or its 3 portions. The examiner recommended that the claim would need to further define the actuating stroke, the 3 portions of the actuating stroke, define more structure for the actuation member and it's cooperating parts, define claim 17 as a stapler, and provide a figure for showing the movement of the 1st jaw away from the 2nd jaw during the 2nd portion of of the actuating stroke .